SEAH PEI YEE A

v.

HAP SENG STAR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCVC-1028-09-2012]
27 JUNE 2013

CIVIL PROCEDURE: *Judgments and orders - Application to amend - Summary judgment - Whether court functus officio - Accidental slip or omission - Whether clerical mistake - Whether only applied to errors in expressing intention of court - Whether applied to errors made by solicitor - Inherent power of court to amend - Rules of Court 2012, O. 1A, O. 20 r. 11 & O. 92 r. 4* C

The plaintiff in her statement of claim during a summary judgment application sought to be fully compensated for all the damages and losses suffered by the plaintiff as a result of a purchase of a Mercedes Benz ('the car') which was sold by the defendant. The car was defective, not of merchantable quality and not road worthy. The court allowed the plaintiff's application for summary judgment and granted the plaintiff's prayer according to the plaintiff's statement of claim. However, the plaintiff could not get the agreement of the defendant to pay two additional sums of money which were not expressly stated in the court's order. The plaintiff then applied to amend the sealed judgment and order. The amendments were necessary in order to give effect to the court's order so that the defendant would cause the name registered in the car grant to be transferred back to the defendant and that the initial deposit was rightly returned to the plaintiff. The error of the court's order was not made by the court but was caused by the solicitor for the plaintiff who did not include the words that were sought to be inserted in the current amendment. As a result of the omission, the court gave the order according to the exact words stated in its prayers. The issues for determination *inter alia* were: (i) whether the court was *functus officio* in granting the plaintiff's application to amend; (ii) whether the application to amend could be allowed under O. 20 r. 11 of the Rules of Court 2012 ('ROC'); and (iii) whether amendment necessary to give effect to the court's intention and plaintiff's prayer in the statement of claim. D E F G H

Held (allowing plaintiff's application):

(1) The court was not *functus officio* and the application for amendment could be allowed under the slip rule in O. 20 r. 11 of the ROC. It was clear that the plaintiff sought to be fully compensated for all I

A the damages and losses suffered. Thus, in granting summary judgment by the declaration made in the statement of claim, it meant that the court allowed the plaintiff to be fully compensated for the damages and losses suffered and to restore the plaintiff to the original position before she entered into the agreement with the B defendant to purchase the car. (paras 4, 11 & 12)

(2) Although the error was caused by the plaintiff's solicitor, the error and omission was inadvertently continued or perpetuated, at second instance, by the court when it reiterated the exact words of the plaintiff's prayers in the statement of claim. Thus, in the interest of C justice, the amendments sought by the plaintiff under O. 20 r. 11 of the ROC was allowed. The court was satisfied that the errors arose from the accidental slip or omission of the solicitor for the plaintiff and was subsequently followed by the court might be corrected by the court without an appeal to the Court of Appeal. D (paras 14 & 15)

(3) Pursuant to O. 92 r. 4 and O. 1A of the ROC, if the court did not allow the amendments, the court order would result in huge losses to the plaintiff and that would negate the fruit of her successful litigation *vide* her application for summary judgment. E (paras 17 & 18)

Case(s) referred to:
Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors and Another Appeal [2012] 1 LNS 775 CA ***(foll)***
Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd [2012] 1 LNS 961 CA ***(foll)***

F

Legislation referred to:
Rules of Court 2012, O. 1A, O. 20 r. 11, O. 92 r. 4

For the plaintiff - Cyrus Tiu Foo Weei; M/s Joseph Ting & Co
For the defendant - JL Foo (Niven Nambiar with him); M/s Gan Partnership

G

Reported by Sandra Gabriel

JUDGMENT

H

Yeoh Wee Siam J:

Enclosure 53

[1] This is the plaintiff's application to amend the sealed judgment and order dated 29 January 2013 ('the court order') which court order was I given after the court allowed the plaintiff's application for summary judgment *vide* encl. 7 (see judgment on encl. 7 dated 13 February 2013).

[2] The main amendments sought by the plaintiff as outlined in exh. SPY6 of the plaintiff's affidavit in support affirmed on 15 April 2013 (encl. 54), *inter alia*, are as underlined below:

MAKA ADALAH PADA HARI INI DIHAKIMI seperti berikut:

(a) Deklarasi bahawa Hap Seng Star Sdn Bhd (No. Syarikat: 659844-H) (Selepas ini dirujuk sebagai "Defendan tersebut") perlu mengambil balik kereta no. plat WWM 9696 dengan no. enjin 27186030412835 dan no. casis WDD2040486L055638 (Selepas ini dirujuk sebagai "kereta tersebut") yang dijual Defendan dan telah berada dalam simpanan Defendan sejak 13.05.2012 serta membuat kesemua bayaran yang diperlukan disini untuk menyebabkan nama didaftarkan dalam Geran kereta dipindahmilik kepada Defendan;

(b) Pembayaran kepada Plaintif sebanyak RM191,690.97 bersama dengan caj terma sebanyak 2.42% setahun berjumlah kepada RM33,800.00 dan faedah 4.55% setahun sebagai caj bank yang berjumlah RM233,880.00 dan apa-apa bayaran termasuk RM86,227.83 yang merupakan wang dibayar Plaintif dan/atau penalti yang akan dikenakan oleh bank pembiaya terhadap Plaintif.

Court's Decision Given On 20 June 2013 Regarding Encl. 53

[3] The plaintiff's application is allowed. Costs of RM1,000 are to be paid by the plaintiff to the defendant forthwith.

Grounds of Decision

[4] The court is of the view that the court is not *functus officio* and the application for amendment can be allowed under the slip rule in O. 20 r. 11 of the Rules of Court 2012 ("the ROC") which provides:

Amendment of judgment and orders (O. 20, r. 11)

11. Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.

[5] In this case, the error in the court order, at first instance, was not made by the court. The error was caused by the solicitor for the plaintiff who did not include the words now sought to be inserted in the court order by the amendment ie, the words were omitted or not stated in prayers (a) and (b) of para. 25 of in the statement of claim ("prayers (a) and (b)"), and later in the same prayers in the application

for summary judgment in encl. 7. As a result of this omission by the solicitor for the plaintiff, the court, when giving the court order upon granting summary judgment to the plaintiff, gave the court order according to the exact words stated in prayers (a) and (b).

[6] Subsequently, when the plaintiff endeavoured to enforce the court order, the plaintiff could not get the agreement of the defendant to pay the following two additional sums of money which were not expressly stated in the court order ie, all payments made by the plaintiff thus far for:

(i) The past year's instalment payments; and

(ii) The initial deposit of RM86,227.83.

[7] The above two payments, in particular the payment in (i), are necessary in order to give effect to prayer (a) in the court order so that the defendant would then cause the name registered in the car grant to be transferred back to the defendant. The initial deposit should rightly be returned to the plaintiff since the defendant is getting the car back.

[8] In *Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd* [2012] 1 LNS 961 the Court of Appeal stated that "It is trite that the court cannot entertain or grant any relief not prayed for by the respondent".

[9] However, in the present case, upon a perusal of para. 20 of the plaintiff's statement of claim, it is noted that before stating her prayers in (a) and (b), the plaintiff did plead her claim for damages and the particulars of her claim, *inter alia*, as follows:

> 20. Menerusi surat peguam Plaintif bertarikh 12.06.2012, Defendan telah dimaklumkan bahawa perjanjian dengan Defendan telah ditamatkan akibat kegagalan Defendan untuk membekalkan barangan boleh diperdagang dan/atau gagal untuk memperbaiki Kereta tersebut. Maka Plaintif menuntut untuk gantirugi sebanyak RM350,107.83 setakat 12.06.2012 untuk kerugian dan kehilangan langsung dan/atau tidak langsung yang Defendan tahu dan/atau sepatutnya tahu. Butir-butirnya adalah seperti berikut:
>
> BUTIR-BUTIR
>
> (a) Pemulangan Deposit tersebut = RM86,227.83
>
> (b) Pembayaran RM191,690.97 bersama dengan caj terma sebanyak 2.42% setahun berjumlah kepada RM33,880.00 dan faedah 4.55% setahun sebagai caj bank dan apa-apa bayaran dan/atau penalti yang akan dikenakan oleh bank pembiaya terhadap Plaintif;

(c) ... ;

(d) ... ; and

(e) Kehilangan kegunaan Kereta tersebut bermula 13.05.2012 pada harga RM150.00 sehari.

[10] In *Kuan Pek Seng @ Alan Kuan v. Robert Doran & Ors and Another Appeal* [2012] 1 LNS 775; [2012] MLJU 1374, Jeffrey Tan JCA (as he then was) held that the relief claimed must surface from the pleaded facts that is, "there must be an inner connection, a legal nexus, between the facts relied on and the relief or remedy claimed".

[11] Applying the legal principles from *Mature Land Sdn Bhd* (*supra*) and *Kuan Pek Seng @ Alan Kuan* (*supra*) to the present case, I find that from the above pleading of the plaintiff in para. 20 of the statement of claim, it is clear that the plaintiff sought to be fully compensated for all the damages and losses suffered by her as a result of the Mercedes car that was sold to her by the defendant, which is a brand new 21 day old car, a Mercedes, was found in my judgment for encl. 7 dated 13 February 2013 to be defective, not of merchantable quality, and not roadworthy.

[12] Thus, when the court granted summary judgment to the plaintiff, by the declaration made in prayer (a), it means that the court would allow the plaintiff to be fully compensated for her damages and losses suffered, and restore her to her original position before she entered into the agreement with the defendant to purchase the car. This would include the two sums in (i) and (ii) above. Unfortunately for the plaintiff, due to the negligence or mistake of the solicitor for the plaintiff, the two sums in (i) and (ii) above, as envisaged in para. 20 of the statement of claim, were omitted from prayers (a) and (b).

[13] Due to the above omission, the plaintiff is now suffering undue difficulties and hardship in enforcing the court order and getting back all the monies paid by her in (i) and (ii) above.

[14] While the error by way of the omission in prayers (a) and (b) of the court order was not at the instance of the court, by the fact that the solicitor for the plaintiff made such an error or omission, the error or omission was inadvertently continued or perpetuated, at second instance, by the court when it reiterated the exact words of the plaintiff's prayers in (a) and (b) in the statement of claim. This has caused severe monetary losses and gross injustice to the plaintiff.

[15] In the interest of justice, I decided to allow the amendments sought by the plaintiff under O. 20 r. 11 of the ROC. I am satisfied that the errors arising from the accidental slip or omission of the solicitor for the plaintiff, and subsequently followed by the court, may be corrected by the court by this application without an appeal to the Court of Appeal.

[16] I am also of the view that the original words in prayer (b) ie, "dan apa-apa bayaran" are not limited by the *ejusdem generis* rule by the preceding words ie, payment for charge term and interest as stated in that prayer, but are a genus or grouping by itself which is wide enough to include or cover the deposit of RM86,227.83 paid by the plaintiff to the defendant.

[17] In deciding the above, the court further considered the following provisions of O. 92 r. 4 and O. 1A of the ROC:

Inherent powers of the Court (O. 92 r. 4)

4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court;

Order 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

Regard shall be to justice (O. 1A)

1A. In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[18] If the court does not allow the amendments, the court order would result in huge losses to the plaintiff and that would negate the fruit of her successful litigation *vide* her application for summary judgment. That surely is not the intention of this court. It must also be noted at this stage that the defendant has on record withdrawn its appeal to the Court of Appeal regarding the court's decision granting summary judgment to the plaintiff.

[19] Based on the above considerations, I therefore ordered accordingly.